

1 Gregory G. Murphy (#1953)  
Doug James (#2237)  
2 MOULTON BELLINGHAM PC  
Suite 1900, Crowne Plaza  
3 P. O. Box 2559  
Billings, Montana 59103-2559  
4 Telephone (406) 248-7731  
Direct Dial (406) 238-1565  
5 Fax (406) 248-7889  
[Greg.Murphy@moultonbellingham.com](mailto:Greg.Murphy@moultonbellingham.com)  
6 [Doug.James@MoultonBellingham.com](mailto:Doug.James@MoultonBellingham.com)

7 Attorneys for OneWest Bank

8  
9 IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA

10  
11 IN RE

12 BLACK BULL RUN DEVELOPMENT LLC,

13 Debtor.

No.10-60593 -RBK  
(Chapter 11)

14 **MOTION TO CONVERT TO**  
**PROCEEDING UNDER CHAPTER 7,**  
**DEMAND FOR ADEQUATE**  
**PROTECTION, and NOTICE OF**  
**OPPORTUNITY TO OBJECT AND**  
**REQUEST A HEARING**

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17  
18 **MOTION**

19 In accordance with 11 U.S.C. § 1112, Bankruptcy Rules 9013, 9014, 1017 and Local  
20 Rule 1017-1(b), OneWest Bank moves the Court to convert this proceeding under Chapter  
21 11 to a proceeding under Chapter 7 on the following grounds:

- 22 1. There is substantial and continuing losses to and diminution of the estate,  
23 and there is an absence of a reasonable likelihood of rehabilitation;  
24 2. The Debtor is and will be unable to effectuate substantial confirmation of a  
25 plan;

3. The Debtor is unable to provide the adequate protection to OneWest Bank to which it is entitled and without the property securing the debt to OneWest there is no reasonable prospect of rehabilitation or a confirmed plan;
4. Conversion to Chapter 7 will be in the best interests of the estate and the creditors.

# Memorandum

## Introduction

The Debtor filed its petition for relief on March 22, 2010. The Debtor has represented to the Court and to the creditors that it does not intend to rehabilitate, but rather to liquidate. But, the Debtor's schedules, statements of financial affairs, and operating reports, as well as its statements on the record and its representations made in connection with its applications to incur debt, demonstrate conclusively establish that it has no funds with which to liquidate effectively the assets of the estate or to maintain the assets of the estate to the benefit of the creditors. In addition, the Debtor has no reasonable prospect of obtaining sufficient funds to accomplish an orderly liquidation. As a consequence, "cause" exists under 11 U.S.C. § 1112 for converting this proceeding to a Chapter 11 proceeding.

Moreover, OneWest Bank, which is owed over \$30,000,000 and is significantly undersecured by the collateral it holds, will be entitled to adequate protection payments from the Debtor under 11 U.S.C. § 362(d) in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of OneWest's Bank's interest in the real estate securing its debt commencing 90 days after the order of relief. OneWest Bank respectfully demands that adequate protection.

Black Bull Run Development, LLC is a single project real estate developer. It generates substantially all of its gross income from the business of operating its real estate

1 project (selling lots) and incidental activities. See, 11.U.S.C. § 101(51C). In fact, since it  
2 has not sold any lots for over a year, it has no income. The order for relief issued March  
3 26, 2010. 90 days after March 26, 2010 is June 24, 2010. The Debtor is unable, and will  
4 be unable to commence those payments commencing June 24.

5 If relief from the stay imposed by 11 U.S.C. § 362 is granted, the Debtor cannot  
6 effectively rehabilitate or liquidate the assets of the estate. Therefore, this Court should  
7 order this proceeding converted to a proceeding under Chapter 7 within which a trustee  
8 may orderly liquidate the assets for the benefit of the creditors.

#### 9 Argument

10 In April, the Debtor represented to the Court both in written filings (See Doc. # 12)  
11 and in open court that it did not have the funds to maintain the assets of the estate and to  
12 administer the estate. At the hearing on April 26, the Debtor's representative testified that  
13 there were no lots sold in the year proceeding the bankruptcy petition, and that there is no  
14 reasonable prospect of selling lots during the bankruptcy proceeding.

15 The Debtor requested authority to obtain credit with which to administer the estate,  
16 and to operate The Black Bull Golf Club, Inc, a debtor in another proceeding. However, the  
17 Debtor could neither obtain unsecured credit nor secured credit that adequately protect  
18 OneWest Bank or the other secured creditors. Therefore, the Debtor does not have the  
19 funds to maintain the OneWest's collateral during any reasonable attempt at a rehabilitation  
20 or an orderly liquidation. The Debtor cannot operate effectively under Chapter 11.

21 On June 3, 2010, the Debtor filed a second motion for authority to obtain credit, but  
22 that proposal suffers from the same flaws as the previous application, and more. (See,  
23 OneWest Bank's objection to Debtor's June 3 motion.)

24 By the Debtor's own filings and testimony, without funds to maintain the assets of the  
25 estate, substantial and continuing losses will occur and the value of the estate asset will be

1 diminished. By the Debtor's own admission, without funds to operate the Debtor can  
2 neither rehabilitate nor conduct an orderly liquidation maximizing the recovery for the  
3 creditors of the estate.

4 11 U.S.C. § 1112(b) permits a party in interest like OneWest Bank to request  
5 conversion from Chapter 11 to Chapter 7. The Court may order conversion "for cause" in  
6 the best interests of the creditors and the estate. 11 U.S.C. § 1112(b)(4) says that "cause"  
7 includes "substantial or continuing loss to or diminution of the estate and the absence of a  
8 reasonable likelihood of rehabilitation." Since by the Debtor's own admission the estate is  
9 being diminished and is suffering continuing losses, and since there is an absence of a  
10 reasonable likelihood of rehabilitation, the Court should order conversion.

11 Moreover, as noted above, the Debtor has no prospect of making the adequate  
12 protection cash payments required by 11 U.S.C. § 362(d)(B) commencing June 24, 2010.  
13 OneWest Bank would be entitled to a lifting of the stay. Without the protection of the stay,  
14 the Debtor cannot effectively rehabilitate or liquidate in the context of a Chapter 11  
15 proceeding under a confirmed plan.

16 The examples of "cause" contained in 11 U.S.C. § 1112(b) are not exhaustive. E.g.,  
17 *In re Eclair Bakery, Ltd.* (2000, BC SD NY) 55 BR 121; *In re Hampton Hotel Investors, L.P.*  
18 (2001, BC SD NY) 270 BR 346, 47 CBC2d 516. While no longer an enumerated ground  
19 under 11 U.S.C. § 1112(b)(4), conversion is appropriate for cause where the court finds that  
20 a feasible plan is not possible. *In re 3 Rem, Inc.*, 2006, BC ED Pa) 343 BR 113, 46 BCD  
21 161.

22 11 U.S.C. § 1112(b) requires the Court to engage in a two-step process in  
23 determining whether to convert or dismiss a Chapter 11 case; first, the Court must  
24 determine whether cause exists either to convert or dismiss the case, and after the Court  
25 finds that cause exists, it then must decide whether it is in the best interests of the creditors

1 to dismiss the case or convert it to Chapter 7. *In re Hampton Hotel Investors, L.P.* (2001,  
2 BC SD NY) 270 BR 346, 47 CBC2d 516. The Court should consider and weigh the totality  
3 of the facts and circumstances of the individual case when determining ways is in the best  
4 interests of creditors.

5 Here, there are a number of construction lien claimants who claim priority liens.  
6 Those liens can more effectively and efficiently sorted out in the context of bankruptcy  
7 proceedings. Conversion to Chapter 7 will also eliminate the costs of administration of the  
8 Chapter 11 proceeding, and will allow for reasonably prompt sale free and clear of all liens  
9 under 11 U.S.C. § 363. Under 9<sup>th</sup> Circuit Law, a sale under 11 U.S.C. § 363 cannot occur  
10 outside the context of a confirmed plan. *Clear Channel Outdoor, Inc. v. Knupfer*, 391 B.R.  
11 25 (2008). Conversion to Chapter 7 will allow for a sale under § 363 and the possibility of  
12 a meaningful distribution to unsecured creditors.

13 For the foregoing reasons, and in the best interests of the estate and the  
14 creditors, the Court should order this proceeding converted to a proceeding under  
15 Chapter 7.

16 DATED this 10<sup>th</sup> day of June, 2010.

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18 MOULTON BELLINGHAM PC

19  
20 By /s/ GREGORY G. MURPHY

21  
22 Gregory G. Murphy  
23 Doug James  
24 Attorneys for OneWest Bank  
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**NOTICE OF OPPORTUNITY TO RESPOND AND REQUEST A HEARING**

If you object to the motion, you must file a written responsive pleading and request a hearing within **FOURTEEN DAYS (14)** days of the date of this motion. The responding party shall schedule the hearing on the motion at least twenty (20) days after the date of the response and request for hearing and shall include in the caption of the responsive pleading in bold and conspicuous print the date, time and location of the hearing by inserting in the caption the following:

**NOTICE OF HEARING**

**Date:** \_\_\_\_\_

**Time:** \_\_\_\_\_

**Location:** \_\_\_\_\_

If no objections are timely filed, the Court may grant the relief requested as a failure to respond by any entity shall be deemed an admission that the relief requested should be granted.

MOULTON BELLINGHAM PC

By /s/ **GREGORY G. MURPHY**

Gregory G. Murphy

Doug James

Attorneys for OneWest Bank

**CERTIFICATE OF MAILING**

I, the undersigned, do hereby certify, under penalty of perjury, that on this 10<sup>th</sup> day of June, 2010, a true and correct copy of the within and foregoing document was mailed, first class postage prepaid to:

JEFFREY A. BALL  
323 SOUTH WALLACE  
BOZEMAN MT 59715

DATED this 10<sup>TH</sup> day of June, 2010.

MOULTON BELLINGHAM PC

By /s/ GREGORY G. MURPHY

Gregory G. Murphy  
Doug James  
Attorneys for OneWest Bank